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No. 82-648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN
~~TYRONE C. FAHNER~~, Attorney General of Illinois, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* BALTIMORE GAS & ELECTRIC COMPANY, *ET AL.*

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BRIEF OF *AMICI CURIAE* BALTIMORE GAS & ELECTRIC COMPANY, *ET AL.*

Amici curiae Baltimore Gas & Electric Company, Carolina Power & Light Company, Connecticut Yankee Atomic Power Company, Florida Power & Light Company, Georgia Power Company, Gulf States Utilities Company, Middle South Services, Inc., Northeast Nuclear Energy Company, Northern States Power Company, Pennsylvania Power & Light Company, The Connecticut Light & Power Company, The Hartford Electric Light Company, Virginia Electric & Power Company, Western Massachusetts Electric Company, Wisconsin Electric Power Company and Wisconsin Public Service

Corporation (hereinafter "Public Utilities") submit this brief in opposition to the Petition For A Writ Of Certiorari filed in this case by Tyrone C. Fahner, Attorney General of Illinois (hereinafter "the State"). All parties have consented to the filing of this brief; copies of the consents have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

The Public Utilities are companies that operate or are constructing commercial nuclear power plants outside the State of Illinois. These plants generate, or will generate, spent nuclear fuel during the course of normal operation. Had it not been held unconstitutional in the court below, the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111 1/2, §§ 230.21-.24 (1980), would have precluded the Public Utilities from storing their spent fuel at the General Electric spent fuel storage facility at Morris, Illinois. The Morris facility is the only "away-from-reactor" spent fuel storage facility ("AFR") in the United States that is currently accepting commercial spent fuel.

The Act also would have had serious implications for the nation's nuclear power industry and for the implementation of a national program for the management of spent fuel and the permanent disposal of nuclear wastes. Had it been upheld, the Act would have established the principle that any state could stop at its borders spent fuel and radioactive wastes destined for a radioactive waste repository or interim storage facility in that state, notwithstanding the national interests involved. Indeed, the philosophy underlying the Act would allow each state to prohibit transportation into that state of virtually any arguably hazardous item from its sister states.

Because of these concerns, the Public Utilities participated as *amici curiae* in this case both at the district court and at the court of appeals, urging that the Spent Fuel Act should be held unconstitutional. The Public Utilities likewise urge here that the State's petition should be denied.

STATEMENT OF FACTS

Nuclear power is one of the major sources of energy in the nation, but it unavoidably generates radioactive wastes along with the energy it produces. One of the most crucial issues for the nation's nuclear power industry is the ability to store and ultimately to dispose of radioactive waste in a manner consistent with the public health and safety. In a nuclear power reactor, the uranium fuel is contained in fuel rods located in the reactor core. After about three years of use, these fuel rods become "spent" as accumulated radioactive fission products reduce their ability to sustain nuclear reactions. The rods must then be replaced to enable the reactor to operate efficiently.[1]

After the spent fuel rods are removed from the reactor, they are temporarily stored in water-filled basins ("spent fuel pools") adjacent to the reactor.[2] The eventual disposition of spent fuel will be either permanent disposal or

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[1] For recent discussions of spent fuel storage and disposal, see *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 735-36 (3d Cir. 1982); *Potomac Alliance v. NRC*, 682 F.2d 1030, 1032-34 (D.C. Cir. 1982) (Bazelon, J., concurring).

[2] Currently, utilities are storing more than 27,000 spent fuel assemblies in their spent fuel pools. DOE, *Spent Fuel Storage Requirements*, DOE/RL-82-1, Table 10, at 23 (June 1982).

reprocessing.[3] However, commercial reprocessing is not now available and is unlikely to be available in the near future.[4] Nor is there today a permanent repository to which spent fuel can be sent, although the United States Department of Energy ("DOE") is carrying out a very substantial program to develop a permanent repository for spent fuel and reprocessing wastes.[5]

In the current absence of commercial reprocessing or a permanent storage repository, utilities must continue to

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[3] When spent fuel is reprocessed, the reusable uranium and plutonium remaining in the spent fuel are separated from the radioactive wastes. This uranium and plutonium may then be "recycled" into new reactor fuel assemblies. *See Westinghouse Electric Corp. v. NRC*, 598 F.2d 759, 762-65 (3d Cir. 1979).

[4] Although a commercial reprocessing facility at West Valley, New York, operated from 1966 to 1971, there are today no commercial reprocessing facilities in operation in the United States. The moratorium on commercial reprocessing imposed in 1977, 13 Weekly Comp. Pres. Doc. 506 (Apr. 7, 1977), has now been lifted. 17 Weekly Comp. Pres. Doc. 1101 (Oct. 8, 1981). However, it is unlikely that commercial reprocessing will be available for at least a decade.

[5] Prehearing Statement of DOE (Dec. 21, 1981), in Nuclear Regulatory Commission Docket No. PR-50, 51 (44 Fed. Reg. 61,372) *Proposed Rulemaking on the Storage and Disposal of Nuclear Waste*. DOE is spending hundreds of millions of dollars each year on this program. *See* H. Rep. No. 345, 97th Cong., 1st Sess. 26, 32 (Nov. 19, 1981) (FY 1982 appropriations totalling $217 million); Office of Management and Budget, *Budget of the United States Government, 1983*, at 5-43 ($350 million for commercial nuclear waste programs in FY 1983). DOE is already making preparations to sink exploratory shafts to allow underground investigation of permanent disposal sites. DOE, *Fiscal Year 1982 Congressional Budget Request, Energy Supply Research and Development*, DOE/CR-0011/3, at 123 (Feb. 1981). See pp. 16-18 *infra* for a discussion of the pending federal nuclear waste disposal legislation.

store their spent fuel on an interim basis. Typically, storage of this fuel has been in a spent fuel pool at the nuclear power plant. These pools were originally sized only for short-term storage, because it was assumed that the spent fuel would be regularly shipped off-site for reprocessing. However, currently operating reactors have dramatically increased the storage capacity of their pools by changing the racks in which the spent fuel is stored so that the fuel assemblies can be stored closer together.[6] Notwithstanding these efforts, many reactors will simply run out of on-site storage space by the mid- to late-1980's. By that time, structural limits on plant design will effectively prohibit further increases in the pools' storage capacities. By 1990, some 12-15 operating reactors will have exhausted their storage capacities.[7] At that point, the utilities will have to find somewhere else to store their spent fuel or shut down their reactors.

The replacement power and other costs of shutting down a nuclear power plant are astronomical, and utilities have a very limited range of options for storing the additional spent fuel that their reactors will discharge. Many studies have confirmed that AFR's will be needed for this purpose by the mid- to late-1980's.[8] There exist today

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[6] This method for increasing storage capacity is described in *Minnesota v. NRC*, 602 F.2d 412, 413-14 (D.C. Cir. 1979), and in *Township of Lower Alloways Creek, supra* n.1, at 736-37.

[7] NRC, *Quarterly Status Report on the Away-From-Reactor (AFR) Spent Fuel Storage Situation* 8 (Aug. 2, 1982).

[8] *See, e.g.*, NRC, *Final Generic Environmental Impact Statement on Handling and Storage of Light Water Power Reactor Fuel*, NUREG-0575, ES11-12 (Aug. 1979); DOE, *Spent Fuel Storage Requirements*, DOE/SR-0007 (Mar. 1981); NRC, *Quarterly Status Report on the Away-From-Reactor (AFR) Spent Fuel Storage Situation* (Aug. 2, 1982).

three AFR's in the United States. As the court of appeals noted, the General Electric spent fuel facility at Morris, Illinois is the only one which is presently accepting commercial spent fuel for storage. Appendix to Petition For Certiorari ("Pet. App.") at 2a. The other AFR's are at West Valley, New York, and at Barnwell, South Carolina. The West Valley AFR is now owned by the State of New York, and it is no longer accepting additional spent fuel, although some spent fuel is currently being stored there. The Barnwell facility is not licensed by the NRC and has never operated.

The Spent Fuel Act is a direct attack on the Morris facility and would prohibit its use as an important element of the nation's radioactive waste management efforts. The Act also would have set an unfortunate precedent that could have interfered with the development of permanent geologic repositories for spent fuel and high-level radioactive waste. There will be only a few permanent repositories, and the radioactive material will have to be shipped from one state to another. If the Spent Fuel Act is valid, any state could bar radioactive shipments from crossing its borders and could block the siting of a repository within its territory. Any such result would be a serious obstruction of the nation's nuclear waste disposal program.

SUMMARY OF ARGUMENT

The decision of the court below is a routine application of the supremacy and commerce clauses to a state statute that is plainly unconstitutional. The Illinois Spent Fuel Act is clearly preempted by the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and it is also an impermissible obstruction of interstate commerce. The Seventh Circuit's holding to that effect is consistent with pertinent

decisions of this Court and other courts of appeals. The correct application of well-established constitutional principles by a lower court does not call for Supreme Court review.

The State's petition should also be denied because the bulk of the issues and arguments it raises were never urged in the court of appeals and never decided by that court. In particular, the State did not rely upon the tenth amendment or section 274(k) of the Atomic Energy Act, 42 U.S.C. § 2021(k), in the court below. In addition, the State's present characterization of the Spent Fuel Act as an economic measure designed to protect the State Treasury is new in this Court and totally inconsistent with the State's argument below that the Act was designed to protect public health by eliminating a source of radioactive air pollution. The Supreme Court should not consider issues that have not been argued or decided in the court below.

Finally, it would be inefficient and wasteful of scarce judicial resources to consider this case, because of the comprehensive nuclear waste disposal legislation that is currently pending before Congress. The legislation would substantially alter the statutory context in which this case arose. It would also eliminate the basis for the complaints in the State's petition about the alleged lack of a national waste disposal program. Supreme Court review is inappropriate when the factual and legal bases of the case are likely to be changed through intervening congressional action.

ARGUMENT

I. The Spent Fuel Act Is Preempted By The Atomic Energy Act

The district court held the Spent Fuel Act preempted by the Atomic Energy Act on the basis of an established

line of cases beginning with *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).[9] In the court of appeals, the State acknowledged "the general rule of federal preemption set forth in *Northern States Power Co. v. Minnesota* . . . ." State ct. app. brief at 61. The State's *only* argument to avoid preemption was that the Spent Fuel Act is a valid radioactive pollution control measure authorized by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. *Id.* at 56-62. In this Court, the State has abandoned its Clean Air Act argument and now contends that preemption is avoided through section 274(k) of the Atomic Energy Act, 42 U.S.C. § 2021(k). Pet. at 6-13. This issue was not raised, argued or decided in the court of appeals, and therefore it should not be considered by this Court. *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137, 1143 n.7 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Even if the State's argument were to be considered on the merits, it is insufficient to warrant Supreme Court review.

Section 274 of the Atomic Energy Act authorizes the NRC to turn over to the states limited regulatory author-

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[9] District Court's Memorandum Opinion and Order dated Oct. 12, 1981, at 5-6. Numerous cases have held that the Atomic Energy Act preempts state regulation of the radiological hazards of nuclear energy. *See, e.g., Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 15-17 (1976); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 579-81 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3173 (U.S. Sept. 2, 1982)(No. 82-386); *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 922-23 (10th Cir. 1981), *appeal filed*, 51 U.S.L.W. 3025 (U.S. May 20, 1982)(No. 81-2159); *United States v. City of New York*, 463 F. Supp. 604 (S.D.N.Y. 1978).

ity over byproduct material, source material and special nuclear material in quantities not sufficient to form a critical mass. The NRC may cede authority under this provision on a state-by-state basis pursuant to an agreement with the governor of the state. Illinois has never entered into such an agreement with the NRC, and section 274 therefore has no application here. *See Illinois v. Kerr-McGee Chemical Corp.*, *supra* n.9, at 580. Even if there were such an agreement between Illinois and the NRC, it still would not permit state regulation of spent nuclear fuel. Spent fuel contains sufficient quantities of special nuclear material (enriched uranium and plutonium) to form a critical mass[10] and is thus specifically excluded from the scope of section 27

In addition, section 274(c)(4) requires the NRC to retain authority and responsibility for regulation of the disposal of such special nuclear material as the NRC finds sufficiently hazardous to require an NRC license for disposal. The NRC has done so with respect to spent fuel and has promulgated comprehensive regulations governing the disposal of spent fuel. *See* 10 C.F.R. Part 60.[11] *See also* 10 C.F.R. §§ 20.301-.306

Notwithstanding the general inapplicability of section 274, the State insists that preemption is avoided by sub-

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[10] *See Township of Lower Alloways Creek*, *supra* n.1, at 737; 10 C.F.R. § 72.73 (design criteria to prevent criticality in spent fuel storage systems).

[11] In the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233, Congress specifically charged the NRC with the responsibility of licensing and regulating permanent disposal repositories. 42 U.S.C. § 5842(3). In 1977 Congress gave DOE ultimate responsibility for establishing and operating disposal facilities, subject to the NRC's licensing and regulatory authority. 42 U.S.C. § 7133(a)(8).

section 274(k), which provides that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." The State attempts to bring itself within this provision by arguing that the Spent Fuel Act was not intended to protect the public from radiation hazards, but rather is an economic measure designed to protect the State's fiscal resources. Pet. at 7-13. The State's theory is that General Electric will "abandon" the Morris facility when it is filled, and the State will have to take over and manage the facility, which is likely to "bankrupt" the State's treasury.[12] *Id.* at 7-8. Here too, the State is shifting its position. In the court below, the State did *not* argue that the Spent Fuel Act is an economic or fiscal measure. Rather, the State represented that the Act is "a state regulation of radioactive air pollution" designed to protect "the health and safety of the people of Illinois" from "cancer, birth defects, or other forms of radiation induced disease, injury or death." State ct. app. brief at 51-52, 57.[13] This radiolo-

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[12] This entirely speculative argument is inconsistent with the NRC's regulations requiring licensees to make elaborate provisions for decommissioning AFR's. 10 C.F.R. §§ 72.18, 72.31(a)(10), 72.38, 72.76.

[13] The State chastises the court of appeals for "ignoring" legislative history which is claimed to reflect the economic nature of the Spent Fuel Act. Pet. at 10. Yet the State cites no legislative history in its petition, and the history it cited in the court of appeals directly contradicts its assertion here. In that court, the State characterized the legislative history as showing that "[t]he General Assembly was also concerned that the very movement of waste into Illinois would endanger health." State ct. app. reply brief at 25. In support of this conclusion, the State relied upon remarks by Senators Joyce and DeMuzio during the debate leading to an override of Governor

gical focus of the Act brings it squarely within the area preempted by the Atomic Energy Act, and section 274(k), by its very terms, has no application. The State should not be heard to argue here for the first time that the Act is an economic measure.

The State's dramatic change in position is a transparent attempt to make this case look like *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2956 (1982)(No. 81-1945). In that case, the Ninth Circuit sustained a California moratorium on new nuclear plants on the ground that it was really a "financial" measure rather than regulation of radiation safety. Thus the State believes that it has found a conflict in the circuits warranting Supreme Court review. Pet. at 11. The Public Utilities believe that *Pacific Legal Foundation* was wrongly decided and should be reversed. That does not mean, however, that there is a conflict in the circuits or that this case should be reviewed. The Ninth Circuit's most recent decision in this area is *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), which is on all fours with the present case. There, the State of Washington passed an initiative prohibiting storage within Washington of low-level nuclear waste generated outside the state. The court held the initiative preempted by the Atomic Energy Act, notwithstanding

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Thompson's veto of the Spent Fuel Act. Both remarks demonstrate a concern for radiological safety, not economics. For example, Senator DeMuzio urged an override because he did not think "the citizens of this State [should] be subjected to the risk of radiation that's been generated in other states . . . ." Transcript of Senate debate, Dec. 3, 1980, at 50.

section 274 of the Act. 684 F.2d at 630. The present case is wholly consistent with *Washington State* and with the vast bulk of the other cases in this area of preemption jurisprudence. *Pacific Legal Foundation* is the only aberration; only *Pacific Legal Foundation* need be reviewed and reversed by this Court.

Finally, even if the Spent Fuel Act were ostensibly a fiscal measure and even if section 274(k) had been argued below, preemption still would be the inevitable result. Section 274(k) was never intended to permit wholesale state prohibitions on the use of federally licensed nuclear facilities. It was designed simply to leave room for state laws "dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act . . . ." *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. 500 (1959). It can hardly be regarded as on the "fringe" of the preempted area to prohibit storing out-of-state spent nuclear fuel at an AFR licensed by the NRC for that purpose. In fact, the NRC has promulgated comprehensive regulations covering the design, siting, licensing and operation of spent fuel AFR's. 10 C.F.R. Part 72. The regulations specifically preclude state regulation of AFR's, even in section 274 agreement states. 10 C.F.R. §§ 72.8, 150.15(a)(7). The pervasive federal regulation of spent fuel and AFR's preempts state regulation in this area, and it clearly precludes the State's attempt to prohibit entirely the storage of all out-of-state spent fuel at the Morris AFR.

The Spent Fuel Act strikes at the very heart of the federal regulatory program, and it directly conflicts with the congressional determination to promote the development and use of atomic energy for peaceful purposes. *See* 42 U.S.C. §§ 2011, 2012(a), 2013(a), 2013(d). If the Spent

Fuel Act is valid, then any state could interfere with any aspect of the federal atomic energy program—even to the point of prohibiting new reactors and shutting down operating reactors—by the simple expedient of labeling its laws "economic." This result is hardly authorized by section 274(k).

II. The Atomic Energy Act Does Not Violate The Tenth Amendment

The State contends that the Atomic Energy Act violates the tenth amendment insofar as the Act prevents Illinois from excluding out-of-state spent fuel from the Morris facility. Pet. at 11-13.[14] This is so, according to the State, because the failure to enact a national waste disposal program makes Illinois the "dumping ground" for the nation's nuclear wastes and thereby deprives the State of "the right to protect its treasury" and holds the State's taxpayers "at ransom." Pet. at 11, 12. Once again, this is an argument that was not raised or decided in the court below and therefore should not be considered here. In any event, the argument is wholly without merit.

The leading case in this area is *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981). There, the Court stated that congressional legislation cannot be held invalid under the tenth amendment unless three requirements are satisfied: (1) the federal statute must regulate "States as States;" (2) it must address matters and that are indisputably "attributes of state sovereignty;" and (3) it must directly impair the states'

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[14] As discussed in the next section of this brief, the commerce clause independently prohibits the State's exclusion of out-of-state spent fuel. It is difficult to see how the tenth amendment can be offended by a result that is *commanded* by the commerce clause.

ability "to structure integral operations in areas of traditional functions." 101 S. Ct. at 2366. None of these requirements is satisfied here.

First, in the context of this case the Atomic Energy Act does not regulate "States as States," but rather the private nuclear power industry. Nothing in the tenth amendment "shields the states from pre-emptive federal regulation of *private* activities affecting interstate commerce." 101 S. Ct. at 2367 (emphasis in original). Second, it can hardly be argued that the right to exclude out-of-state spent fuel from a private AFR is an indisputable attribute of state sovereignty. Third, the Atomic Energy Act does not impair the State's ability to operate its treasury or any other traditional state function. The State's imaginative arguments about being held "at ransom" do not satisfy the third requirement, since the determinative factor is "the nature of the federal action, not the ultimate economic impact on the States." 101 S. Ct. at 2368 n.33; *accord, FERC v. Mississippi*, 102 S. Ct. 2126, 2143 n.33 (1982).

The Atomic Energy Act simply does not intrude upon the inherent sovereignty of Illinois or impair its functioning as a State. The Act therefore does not violate the tenth amendment.[15]

III. The Spent Fuel Act Violates The Commerce Clause

The court of appeals correctly held that the Spent Fuel Act violates the commerce clause by overtly discriminat-

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[15] We are aware of only one case in which the Atomic Energy Act was challenged under the tenth amendment, and the challenge there was summarily rejected. *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981).

ing against out-of-state spent fuel. The controlling precedent is *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in which this Court relied upon the commerce clause to strike down a New Jersey statute barring importation of solid and liquid waste originating outside New Jersey. The State attempts to avoid *City of Philadelphia* by arguing that the Spent Fuel Act is a valid "quarantine" measure designed to prevent commerce in "noxious articles" that are "inherently dangerous" and "could easily result in the leakage of lethal and environmentally destructive radioactive material." Pet. at 14, 15.[16] This Court rejected the same "quarantine" argument in *City of Philadelphia*, holding:

> But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. *Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.*

437 U.S. at 628-29 (emphasis added).

The quarantine exception obviously has no application here. The Spent Fuel Act does not prohibit all traffic in spent fuel regardless of its origin. To the contrary, the Act excludes only out-of-state spent fuel; it has no effect on spent fuel generated within the State, nor does it

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[16] This characterization of the Spent Fuel Act is, of course, completely inconsistent with the State's argument for preemption purposes that the Act is a purely economic measure not aimed at regulating radiological hazards. Like Janus, the State has no difficulty looking in opposite directions at the same time. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540 n.15 (1978).

prohibit transportation of spent fuel *through* Illinois to a destination in another state. If the Spent Fuel Act were a true quarantine measure, it would ban all storage, disposal and other traffic in spent fuel regardless of the source of the spent fuel. The Act does not do so, and it is therefore clearly unconstitutional.

The decision of the court below is a routine application of *City of Philadelphia* and the commerce clause.[17] Supreme Court review is hardly warranted. Indeed, the Spent Fuel Act is precisely the kind of parochial state protectionism that the commerce clause was intended to prevent.

IV. Supreme Court Review Is Inappropriate Because Of Pending Federal Legislation

There is currently pending before Congress comprehensive nuclear waste management legislation that would substantially alter the statutory context in which this case arose and would eliminate the basis for the State's repeated complaints about the alleged absence of a national waste disposal program. *See* Pet. at 4, 6, 7, 8, 11, 12, 13. Because of the changing statutory circumstances, a Supreme Court decision in this case may have little lasting significance or broad application. Accordingly, it would be a waste of scarce judicial resources to hear and decide this case.

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[17] The Ninth Circuit has recently applied the commerce clause in the same way to strike down a Washington State initiative barring importation of out-of-state low-level radioactive waste. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 630-32 (9th Cir. 1982).

In the Senate, the National Nuclear Waste Policy Act of 1982 (S. 1662) was passed by a vote of 69-9 on April 29, 1982. 128 Cong. Rec. S4325-36 (daily ed. April 29, 1982). The corresponding House bill (H.R. 7187) came to the House floor on September 30, 1982, where general debate was completed and all permissible amendments were offered. 128 Cong. Rec. H8161-99 (daily ed. Sept. 30, 1982). Thereafter, Congress adjourned until the beginning of its "lame duck" session on November 29, 1982. *See* 128 Cong. Rec. S13,410 (daily ed. Oct. 1, 1982). It is expected that the House will take up H.R. 7187 shortly after it reconvenes.[18] Differences between the House and Senate bills will have to be resolved, and the legislation will be sent to the President for signature. The nuclear waste legislation is a high-priority item for both Congress and the Administration, and we expect that every effort will be made to ensure that it becomes law before the end of the current session of Congress.

Although the House and Senate bills differ somewhat, the general approach is the same. The legislation declares that it is the responsibility of the federal government to provide repositories for the permanent disposal of spent fuel and other high-level nuclear waste, and to assure that adequate interim storage capacity will be available until the permanent repositories can be put in service.[19] To this

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[18] The House leadership has made a firm commitment to take up H.R. 7187 during the first week of the lame duck session. Letter dated Oct. 13, 1982, from Chairman Udall of the House Committee on Interior and Insular Affairs to Representative Broyhill of the House Committee on Energy and Commerce.

[19] *See* S. 1662, §§ 101, 102, 301, *reprinted in* 128 Cong. Rec. S4325-27 (daily ed. April 29, 1982); H.R. 7187, § 131, *reprinted in* 128 Cong. Rec. H8187 (daily ed. Sept. 30, 1982).

end, the legislation directs DOE to carry out a program of research, development, site selection and construction with the aim of having permanent repositories in operation within the next fifteen years.[20] In addition, provisions are made to facilitate and encourage on-site interim storage of spent fuel and to authorize DOE to make available off-site AFR storage facilities.[21]

Thus the pending waste management legislation will dramatically affect the subject matter of the State's petition and will eliminate any possible basis for concern about the supposed lack of a comprehensive national program to deal with spent fuel storage and disposal. Under these circumstances, Supreme Court review of this case is unwarranted.

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[20] *See* S. 1662, §§ 401-11, *reprinted in* 128 Cong. Rec. S4329-32 (daily ed. April 29, 1982); H.R. 7187, §§ 211-21, *reprinted in* 128 Cong. Rec. H8191-94 (daily ed. Sept. 30, 1982).

[21] *See* S. 1662, §§ 301-14, *reprinted in* 128 Cong. Rec. S4326-29 (daily ed. April 29, 1982); H.R. 7187, §§ 131-37, *reprinted in* 128 Cong. Rec. H8187-90 (daily ed. Sept. 30, 1982).

CONCLUSION

The Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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